No. 13,557

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of
ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, copartners, jointly and severally, d/b/a DAVIS FURNITURE CO.
DOYLE FURNITURE CO., INC., a corporation
LACHMAN BROS., a corporation
HARRY FRANK, an individual, d/b/a MILWAUKEE FURNITURE COMPANY
A. EUGENE PAGANO and M. DE CASTRO, copartners, jointly and severally, d/b/a MISSION CARPET AND FURNITURE CO.
FRANK NEWMAN CO., a corporation
REDLICK-NEWMAN CO., a corporation
SHAFF'S FURNITURE CO., a corporation
JOSEPH H. SPIEGELMAN and LEON SPIEGELMAN, copartners, jointly and severally, d/b/a SAN FRANCISCO FURNITURE CO.
STERLING FURNITURE COMPANY, a corporation
JAMES F. WILEY and VERNA M. GARDNER, copartners, jointly and severally, d/b/a J. H. WILEY THE FURNITURE MAN

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside Supplemental Decision and Order of the National Labor Relations Board.

PETITIONERS' REPLY BRIEF.

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On Petition to Review and Set Aside Supplemental Decision and Order of the National Labor Relations Board.

PETITIONERS' REPLY BRIEF.

On the original hearing of this case this Court in its opinion said:

> "* * * The question arises whether we should determine if the Board's order may be sustained on the ground that it is illegal for the dealers to use the temporary lockout as a counter-economic power to that of the strike in a dispute between employer and employee involving wages and labor conditions."

The case was remanded to the Board to determine "in the first instance" whether a lockout in such circumstances is legal.

The issue thus being narrowed, the General Counsel, at page 4 of his brief, sets forth the position of the Board as follows:

> "It is the Board's position that, where multi-employer negotiations have reached an impasse and the union strikes one of the employers in order ultimately to cause all the employers to accede to its terms, it is an unfair labor practice for the remaining employers to lock out their employees to counter the strike against one of them."

The opinion of the Board in the *Morand Brothers Beverage* case is reprinted in part as an appendix to the brief, and the General Counsel undertakes "analytically to highlight" the correctness of the reasoning of the Board in that opinion in the brief now before this Court.

The position of the Board and of the General Counsel is as follows: Collective bargaining carries with

it the right to strike. The right to strike is implicit in the process of collective bargaining.

As the General Counsel succinctly puts it (Br. p. 5):

> "Protection of the right to strike is indispensable to the effective exercise by employees of the right to bargain collectively. The union's economic demand at a bargaining table derives its ultimate sanction from the power of the employees to withhold their labor concertedly in its support. To the extent that efficacious resort to a strike is curtailed, the strength of the employees' bargaining position is likewise diminished."

The General Counsel thereupon proceeds to outline the concept of the Board and of the General Counsel as to what may appropriately take place during a strike. Such a strike is a queer, unreal economic bout in which the employer serves as a sort of economic punching bag or passive sparring partner for the union in a "contest" in which the union strikes all the blows at such times as it chooses and the employer is limited to picking himself up and binding up his wounds but may neither guard against a blow nor strike a blow in return because, says the General Counsel, such action would constitute "interference" with a protected concerted activity.

If the employer cannot operate without a contract, then and then only, may he engage in what the General Counsel terms a lockout. He may then shut down his business and be without income.

He must, however, be thinking only about *minimizing his own loss* and damage and may not contemplate

any detriment to the union resulting from his shutdown for if he did his act would be *intended* to interfere with a protected concerted activity.

The General Counsel points out at pages 8 and 9 of his brief that under the Board's concept of the law the union must at all times have the sole and exclusive *initiative* in determining *whether* the economic contest will commence, and, if so, *when,* for, as the General Counsel points out, if the employees may be locked out after an impasse has been reached they may be precipitated into an economic contest which may be unpropitious for them. Secondly, the union must at all times determine the *scope* of the strike and the employers may in no way be permitted to take from the union the control of the amount of labor which the union chooses to withhold, for, if the employer were so to do, the employees might be compelled to wage a larger strike than they are willing to undertake, which in turn might have an adverse effect on the union's ability to pay strike benefits.

The General Counsel concludes (Br. p. 9):

> "These drastic consequences clearly interfere with, impede, and diminish the right to strike."

The General Counsel declares that the employer has only two rights when an impasse in bargaining has been reached. First, the employer may unilaterally put into effect employment terms which the employees have finally rejected during the negotiations. (Br. p. 11.) And, second, the employer may shut down and suspend its operations but only *where he "cannot*

operate without a contract, or * * * without assurance that he will not be struck." (Br. pp. 8, 16 and 30.)

We mention in passing that the General Counsel and the Board concede that an employer has the right to undertake to operate his business *after* he has been struck. (This is a right incidentally announced by the Supreme Court of the United States in *N.L.R.B. v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, and not a right conferred upon the employer by the Board.) The General Counsel, at pages 13 and 14 of his brief, points out a number of actions which may be taken in aid of a struck employer who undertakes to operate in face of a strike. We will not dwell upon these however as we are concerned in this case only with the question whether an employer may lock out where a bargaining impasse has been reached.

In such a situation, namely, where an impasse has been reached, the Board in various ways declares that an employer *cannot intentionally exert economic pressure on a union in order to induce the union to modify its demands.*

We quote the Board as follows:

> "Neither Section 8 (a) (1) nor Section 8 (a) (3) of the Act draws any distinction between a discharge and a temporary layoff. The broad language utilized proscribes both permanent and temporary terminations of the employment relationship when directed against protected concerted activity. We are not free to cut down the broad proscriptions of Section 8 (a) (1) and 8 (a) (3) *so as to sanction lockouts which are designed to*

break a bargaining impasse by bringing economic pressure on employees who have engaged in collective bargaining, unless other sections of the statute clearly require it. We find no such requirement." (Br. p. 24.) (Italics ours.)

Again, the Board says:

"It may be urged that, in locking out to gain bargaining concessions, the employee (sic) is not motivated by a desire to interfere with union activity or membership. However, clearly, the resistance by a union, in the interest of the group, to the employer's demands, in the course of good-faith bargaining, is a form of concerted activity for the mutual aid and protection of the group as well as the exercise of the right to bargain collectively, and a mass layoff of union members, depriving them of their means of livelihood, in order to overcome such resistance necessarily is designed to interfere with such concerted activity and collective bargaining, and to discourage membership in the union which by its opposition to the employer's demands has provoked the layoffs. * * *" (Br. p. 28.)

Finally, the Board says:

"* * * We say only that the right of employees to adhere to a position taken by their union in good faith in collective bargaining is one of the most important rights protected by the Act, *that a temporary lockout which has as its purpose causing employees to recede from the bargaining position of their union is presumptively an interference with that right and violative of the Act.* This presumption is rebuttable, in our opinion,

> *only* by a showing that the employer *cannot operate without a contract,* or, as in the *Betts Cadillac* case, *without assurance that he will not be struck.*" (Br. pp. 29 and 30.) (Italics ours.)

Under the foregoing doctrine of the Board, when a bargaining impasse has been reached the union must have the sole initiative as to determining the time of, and the scope of, the strike. The union can continue working with or without a contract or may strike as and when it sees fit. The employer on the other hand is permitted to lock out only where he "cannot operate without a contract or without assurance that he will not be struck."

In the case of such employer lockouts the Board will require proof that it was in fact impossible for the employer to operate without a contract or without assurance that he would not be struck in order to test the honesty of the employer's motives in locking out. This reduces the situations in which an employer is entitled under the Board's rules to lock out to the single situation not only (1) where he *believes* that he cannot operate without a contract, but (2) where *in fact it is impossible* for him to operate. In this single case the Board accords the employer the right to lock out. The "right" to lock out in a situation where the employer is *unable* to operate is obviously meaningless and valueless.

Nevertheless the Board insists that the sixty-day "cooling-off period" in the statute was intended to apply to this single type of lockout.

We quote the Board as follows:

"* * * Multiple sanctions are not unknown to the law. So, the fact that lockouts during the 60-day cooling off period fixed in Section 8 (d) (4) constitute violations of Section 8 (a) (5), does not in our opinion preclude us from finding that such lockouts *also* violate Section 8 (a) (1) and (3) of the Act." (Br. p. 25.)

"But it is urged that, in expressly prohibiting lockouts during the 60-day period, Section 8 (d) (4) by indirection sanctions lockouts occurring after or before that period. If we accepted this view, we would indeed be letting 'the tail wag the dog.' We would be relying on a reference to 'lockouts,' in a context of restriction on their use, as a basis for exempting lockouts generally, or lockouts after a bargaining impasse, from the broad proscriptions of Section 8 (a) (1) and (3), thus limiting—if not virtually nullifying—the safeguards of employees' rights in that section." (Br. pp. 25 and 26.)

"It seems clear to us from a reading of Section 8 (d) (4) that the sole concern of Congress in enacting that provision, and the entire thrust thereof, was to discourage resort to self-help by both employees and unions during the sixty-day period and to induce them to bargain collectively during that period. It is understandable that, in seeking to underscore this purpose, Congress would specifically proscribe the most relevant forms of self-help—namely, strikes and lockouts. It follows from this view that Congress was not concerned at this point with the legal status of strikes and lockouts under other provisions of the

> Act but was solely desirous of insuring that, *whatever that status might be,* no strikes or lockouts would occur during the sixty-day period." (Br. p. 26.)

The Board is thus driven to the position that Congress prescribed a sixty-day "cooling-off period" for *illegal* lockouts as well as for legal lockouts.

Why Congress should prescribe a sixty-day cooling-off period for an illegal lockout is something of a mystery which the Board does not explain. The fact is, of course, that the sixty-day "cooling-off-period" is *a part of the statutory definition of the process of collective bargaining.* (Sec. 8 (d) (1) (2) (3) (4).) To argue that, in defining the process of collective bargaining Congress intended to include forbidden and illegal acts as a part of that process is to twist and distort the language of the statute beyond all reason.

The lockouts which Congress was referring to in its definition of collective bargaining were lockouts by employers for the purpose of bringing pressure on the union to recede from its demands, accept the employer's offer and conclude the collective bargaining process with a contract acceptable to the employers. No other rational meaning can be given the word "lockout" when used in this context.

The Board justifies its action in redefining the term "lockout" by reasoning that the word "lockout" could not have been intended to be used in the statute in its usual ordinary dictionary or common-law meaning

for to do so would tilt the economic scales too strongly in favor of the employer. (See Board's Br. pp. 28 and 29; also pp. 10 and 11.)

How the scales should be balanced in the economic contests between labor and management arising out of collective bargaining is a matter for the judgment of Congress. It is not the function of the Board to change the meaning of statutory language to accord to its own concept of fairness.

The General Counsel asserts that the matter of "whipsawing" has no place in the consideration of this case and argues that absent multi-employer bargaining, a strike at General Motors would not justify Chrysler in locking out its employees even though both companies are competitors and the settlement at General Motors might set the pattern for the industry. (Br. p. 12.)

The example given has no relation to the facts of this case. Admittedly, all employers involved here are and have been parties to a single multi-employer contract and have been accepted by the union as such. Admittedly, the union has struck one employer avowedly for the purpose of securing a single multi-employer contract favorable to the union on terms the union desires. The union proposes to strike one employer until such employer accepts the demands of the union and then in turn to strike another and another, ultimately winding up with a single uniform multi-employer contract. This is whipsawing. The employers are not strangers to one another as in the case of

Chrysler and General Motors, but are parties to the *same contract*. The concerted action they have taken is for the purpose of securing a single contract from the union.

Although it is true, as the General Counsel asserts at page 12 of his brief, that when employers bargain on a multi-employer basis they are considered a single employer for collective bargaining purposes, nevertheless it is perfectly obvious that each employer has his own business and customers and is subject to whipsawing. The entire group is in danger of capitulation of all its members, one by one, unless they have an effective counter-measure against the whipsawing.

The General Counsel reasons as follows (Br. p. 12):

> "The factor of 'whipsawing' is irrelevant for still another compelling reason. It is significant only on the view that petitioners' claimed collective vulnerability to a strike against a single employer entitles them to curtail its effectiveness by locking out their employees. But the effectiveness of a strike is no criterion of its protected character. Strikes are universally fashioned so as to impose the greatest pinch on the employer. The protection accorded strikers is not diminished because the pinch is exerted through exploitation of the competitive position of petitioners any more than it would be lessened because the pinch is exerted by calling a strike at the height of the season for the sale of an employer's products or at a time when a depleted labor market prevents the hire of replacements. It is the essence of strike strategy to take advantage of whatever inheres

> in the employer's situation which disables it from withstanding the pressure exerted. * * *"

This is another version of the "punching bag" concept of collective bargaining advanced by the Board and the General Counsel where all economic blows are struck by only one party. In other words, when an impasse is reached the union has the sole choice and determination as to when to impose the "pinch" on the employer either at the height of the employer's season or perhaps when the employer has his entire capital invested in a full supply of perishable products or when a depleted labor market prevents the hire of replacements. The General Counsel's concept of "protected" activities as protected by the Act gives the employer the choice of submitting to the union demands or of shutting down his establishment, but even here, *only* when he can prove that it is impossible for him to operate. If he shuts down before this time it is an illegal act. (See footnote Br. p. 16.)

The inflationary consequences of such a state of the law have already been mentioned in the earlier opinion of this Court.

We think it far more accords with common sense and with the legislative intent of Congress to permit the lockout to prevent the very process of whipsawing described by the Court. We cannot believe that Congress intended that such resistance to whipsawing constitutes an illegal interference with a protected, concerted activity.

In its zeal to protect and defend the rights of employees, we believe that the Board has stretched the meaning of Section 8 (a) (1) and 8 (a) (3) beyond reason.

The Act makes it an unfair labor practice to interfere with the concerted activities of employees or to discourage membership in the union. We think that the only fair or reasonable interpretation to be given these sections is to limit them to acts of employers designed to *interfere with the right of employees to have a union.*

They were never intended as a guaranty that unions should win all strikes. They were never intended to make it illegal to resist a strike or to exert economic pressure on employees to modify their demands. This is the fundamental mistake of the Board. So long as the employer does not try to "bust" the union, the economic pressures he can exert on the union to facilitate arriving at a mutually satisfactory contract are part of the rough-and-tumble process of collective bargaining. They are the economic counterpart of the strike.

This Court having requested the Board to decide this matter in the first instance, and the Board having done so, this matter is now submitted to this Honorable Court for its opinion for the guidance not only of the employers and employees involved in this case but for the guidance of the vast multitude of employers and employees engaged in multi-employer bar-

gaining on the Pacific Coast and throughout the United States.

The enforceability of the Board's order is solely within the discretion of this Honorable Court. Section 10 (e) and (f) of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., Supp. V, Sec. 151 et seq.); *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 504; *National Labor Relations Board v. American National Insurance Co.*, 343 U.S. 395, 410, 411.

CONCLUSION.

Enforcement of the Board's order should be denied, and petitioners' request that said order be set aside should be granted.

Dated, San Francisco, California,
April 24, 1953.

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